Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1993

IN RE: GRAND JURY PROCEEDINGS,
HAROLD D. HORAK,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID L. HERZOG
1431 First National Center
Omaha, Nebraska 68102
Attorney for Petitioner.

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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PETITION FOR A WRIT OF CERTIORARI

Harold D. Horak, Petitioner, herein respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in these proceedings on May 12, 1980 and to review an Order of that Court entered on May 29, 1980.

OPINIONS BELOW

The Opinions of the United States District Court for the District of Nebraska and the United States Court of Appeals for the Eighth Circuit are not reported. The Court of Appeals Order denying Petition for Rehearing with Suggestion for Rehearing En Banc is also not reported. Copies of these Opinions and of the Order are included in the appendices.

———o———

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1980. A timely Petition for Rehearing With Suggestion for Rehearing En Banc was denied by Order of the Court of Appeals on May 29, 1980. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

———o———

QUESTIONS PRESENTED FOR REVIEW

I

Whether the Court of Appeals erred when it held that Horak was immune from Contempt under 18 U. S. C. § 401 because he had sufficient immunity under 18 U. S. C. §§ 6002 and 6003?

II.

Whether the Court of Appeals erred by joining with a United States District Judge in assisting the government's prosecutor to give a grand jury witness immunity; or, alternatively, did the Judicial Branch step over its

boundaries and engage in a joint venture with the Executive Branch to give a grand jury witness immunity?

III.

Did the government's prosecutor act in bad faith by failing to pursue a grand jury witness for contempt and confinement for refusal to comply with an immunity Order at a time when the grand jury that indicted him was still sitting and ready to hear his compelled testimony and when the government's prosecutor chose to wait until the beginning of a new grand jury term to reimpose a new immunity Order and confinement for a longer period than would have been possible during the previous grand jury term; alternatively, did the Court of Appeals commit error by approving tactical and punitive applications for contempt and commitment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution:

> "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."

Title 18, United States Code (Powers of Court) Section 401:

> "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as
>
> 1) Misbehavior of any person in its presence . . . as to obstruct the administration of justice.
>
> • • •
>
> 3) Disobedience or resistance to its lawful . . . order".

STATEMENT OF THE CASE

(a) Nature of the Case:

Harold D. Horak is now under an Order of Confinement issued by the United States District Court for the District of Nebraska, Honorable Robert V. Denney, entered on February 13, 1980. An appeal of the Order of Confinement and Commitment seeking its vacation, nullification and voiding was denied by the United States Court of Appeals for the Eighth Circuit in its opinion of May 12, 1980. A timely Petition for Rehearing With Suggestion for Rehearing En Banc was denied by the Court of Appeals in its Order of May 29, 1980.

(b) The Course of Proceedings:

Harold D. Horak was subpoenaed to appear before the Nebraska grand jury during August, 1978 and October, 1978 in connection with an investigation as to wiretap activities at Pamida, Inc., a large mercantile corporation based in Omaha, Nebraska that has stores and retail facilities in 13 states and is engaged in interstate commerce doing business in excess of $300,000,000.00. Horak was indicted on four counts of wiretap violations and four additional counts of perjury. Trial ensued before the District Court for the District of Nebraska, see Crim. No. 79-0-002, U. S. D. C., Neb., and a jury of 12, and the Defendant Horak was convicted of three counts of wiretap acts and three counts of perjury and the remaining counts were dismissed by the jury's finding of not guilty of said remaining two counts. The Defendant Horak, after presentence investigation was sentenced to two years of confinement on six counts and was allowed to serve the time concurrently. No appeal occurred or ensued. While con-

fined at Leavenworth, Horak was subpoenaed to appear before the Nebraska grand jury at Omaha on October 3, 1979 and over resistance and objection, was compelled by the Order of the United States District Court, Judge Robert V. Denney, to testify under an Order of Immunity granted under 28 U. S. C. § 1826. The witness, Horak, refused to testify with the Immunity placed upon him on October 3, 1979. No contempt sanctions were requested and the witness was released. On February 12, 1980, Horak again was subpoenaed and again brought to the Nebraska grand jury and again he refused to testify. He was again ordered by District Judge Robert V. Denney to testify under a grant of Immunity and again he refused to do so. Commitment followed and an appeal of the Order of Confinement to the United States Court of Appeals for the Eighth Circuit was denied on May 12, 1980. A Petition for Rehearing With Suggestion for Rehearing En Banc was denied by the Court of Appeals in its Order of May 29, 1980. Horak continues in his incarceration and Petition for Writ of Certiorari to review the Court of Appeals Opinion and Order is herein sought.

———o———

REASONS FOR GRANTING THE WRIT

I.

This Court should issue a Writ of Certiorari in order to clarify how the scope of the Executive immunity under 18 U. S. C. §§ 6002 and 6003 is balanced and checked by the Power of Court under 18 U. S. C. § 401. The Petitioner presents a case that shows how the Judicial function was im-

properly drawn over the line separating powers into the Executive function of pursuing grand jury witnesses with immunity.

In the case of *Kastigar v. United States,* 406 U. S. § 441 (1972), this Court stated that "immunity granted under 18 U. S. C. §§ 6002 and 6003 was sufficient to allow the government to compel a witness to testify even if he had invoked his Fifth Amendment privilege of self-incrimination". But the *Kastigar* Court did not at that time resolve, and this Court has not spoken on, the issue of a witness who testified before a grand jury that indicted him, and who testified, was tried and convicted by a jury, who later on found himself being coerced to change his testimony and to testify in a manner that could cause him to be found in Contempt by the previous Court for any change in his testimony, under power of Court Statute, 18 U. S. C. § 401.

Mr. Horak rightfully contends that if he is coerced into testifying under the purported immunity of 18 U. S. C. §§ 6002 and 6003 and some change in testimony surfaces, the power of Court under 18 U. S. C. § 401, can be brought to bear upon him at the discretion of the trial Judge. Therefore, to force Horak to testify with a chance that some evidence may surface indicating that he may have perjured himself at the previous trial proceedings, and given the likelihood that the previous trial Court could exercise its discretionary powers to punish Horak under 18 U. S. C. § 401, would amount to a deprivation of his constitutional privilege of self-incrimination under the Fifth Amendment.

The critical issue which this Court must accept for review is the power of the trial Judge, and the propriety

of the Court of Appeals' ratification, to give assurances to an immunized witness who still refuses to testify that he will not be held in contempt for any perjury he may have committed in the presence of the trial Judge. When Horak, even after he was given immunity by the government under 18 U. S. C. §§ 6002 and 6003, persisted in his refusal to testify, because he feared the power of the Court under 18 U. S. C. § 401, Honorable Judge Denney of the United States District Court for the District of Nebraska, assured Horak that neither the United States government nor the trial Court would prosecute him for previous perjury using the immunized testimony. This Court should grant a Writ of Certiorari so that it can pronounce that the immunity from prosecution can only be given by the Executive Branch, and that the Judicial Branch has (a) no immunity from prosecution to give and (b) that the trial Court cannot join hands with the government to give immunity. The immunity which the trial Judge was offering to Horak was invalid because it was not given pursuant to an immunity statute, and no statutory procedures for granting it existed. *United States v. DiMauro,* 441 F. 2d 428 (8th Cir. 1971).

This illusion of promise is judicially *ultra vires* and is not a valid contract with the witness which he can rely on, and the trial Court has no jurisdiction to make such a promise. The Court prima facie has an obligation to punish those who commit contemptuous acts such as perjury in its presence, albeit at its discretion. If Horak should testify and comply with the government's desire to have him change his testimony, and crimes implicating others are discovered by his new testimony, the subsequent trial Court hearing this new testimony will

be obligated under 18 U. S. C. § 401 to vindicate its authority and integrity and it will punish Horak for his new testimony. Contempt and perjury are not totally part of the immunity and the government cannot and the trial Court absolutely has no power to grant immunity from the Court's power to punish under 18 U. S. C. § 401.

It is important that this Court issue a Writ of Certiorari so that it can speak on this entanglement of the powers of the judiciary, the executive immunity, and the privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution. There is no federal statute, law or federal common law that allows the Court of Appeals or a United States District Judge to grant assurances to any grand jury witness in the manner that has been proffered in these proceedings. The prosecutor has duped the Courts into the business of granting immunity, a practice that is deplorable and actionable bad faith.

II.

This Court should grant a Writ of Certiorari to pass on the ability of the government and the good faith by government prosecutor to delay bringing a ripe civil contempt proceeding against a grand jury witness who continues to refuse to testify for the sole purpose of gaining a tactical advantage over the witness by the use of a longer term of commitment for refusal to comply with an immunity order.

Mr. Horak was subpoenaed by the United States Attorney to appear before two grand juries in October of

1979 and in February of 1980. During both grand jury proceedings, attempts were made to get Horak to answer a similar set of questions, and in both instances, he refused to answer for fear that he might incriminate himself. After he was immunized under 18 U. S. C. §§ 6002 and 6003, he persisted in his refusal to answer for fear of punishment by the Court under 18 U. S. C. § 401. When Horak was brought before the first grand jury in October of 1979, which was the same grand jury that had indicted him for the substantive crimes, that grand jury had a few months left in its term. The government's prosecutor chose not to pursue civil contempt against Horak because he knew that the coercive weight of a few months imprisonment of Horak, who was already serving term for the substantive crimes, would not be heavy enough to compel him to testify. The prosecutor achieved a tactical advantage over Horak when he delayed his pursuit for civil contempt until the term of the sitting grand jury expired and a new grand jury was empanelled. The prosecutor knew that Horak would be faced with a full term of a new grand jury if he persisted in his refusal to answer.

The government contended, and the trial Court as well as the Court of Appeals agreed, that it has no obligation to pursue a civil contempt against a witness every time it has a ripe case for one. This contention is acceptable and reasonable in some situations. But it is totally wrong for the government to contend and for the Courts to accept, that the government can delay the pursuit of civil contempt against an uncooperative witness just for the purpose of punishing him for his uncooperative spirit. In *United States v. Hanna,* 347 F. Supp. 1010

(D. C. Del. 1972), the Court stated that when the delay in bringing a ripe indictment has the sole purpose of forcing a witness to testify in another trial, and the delay has no basis in the substance of the case at bar, the delay will be for tactical purposes which are not connected to the issues in the case and the indictment will be dismissed.

The government's delay in pursuing an indictment against Horak is not justified by any needs of the government in its prosecutorial duties. If the only possible and reasonable explanation for delay was for tactical purposes. it should have caused the Court of Appeals to dismiss and nullify the civil contempt order againt Horak.

This Court should, therefore, issue a Writ of Certiorari so that it can review the ruling of the United States Court of Appeals for the Eighth Circuit and also afford itself an opportunity to speak on the use of grand jury terms as means of punishing witnesses who refuse to testify after they are immunized.

III.

This Court should grant a Writ of Certiorari to pass on the propriety of the judicial and the executive branches of government joining hands to give immunity to grand jury witnesses.

After he was granted immunity under 18 U. S. C. §§ 6002 and 6003, Horak refused to testify because he felt that the immunity granted would not protect him from being prosecuted by United States District Judge Robert Denney for perjury before him based on testimony given at trial in Crim. No. 79-0-002. It was at this stage of the

proceedings that United States District Judge Robert Denney gave assurances to Horak that neither he nor the United States Attorney would prosecute him for any previous perjury he might have committed. The business of granting immunity from prosecution is reserved for the Executive Branch. The Judicial Branch of Government is vested with powers to see that the laws and the legal procedures of the United States Courts are respected. To carry out their responsibilities, the Courts are vested with punitive powers under 18 U. S. C. § 401, to punish those who commit contemptuous acts in the Court's presence. The Courts have no power to bargain away their obligations in order to help the government in its quest for obtaining testimony from uncooperative witnesses. Therefore, for the trial Court to make offers of immunity to Horak from prosecution after he had claimed his privilege of self-incrimination, and for the Court of Appeals to join in those promises made by the trial Court, it would not only be a precatory judicial gratuity offered without substantive legal justification but most important of all, it would be a violation of the sanctity of the Separation of Powers Clause of the United States Constitution.

If the opinions of the trial Court and the Court of Appeals go without review from this Court, they will set a bad and evil precedent and they will be justifications for unconstitutional excursions by the Judicial Branch into the activities of the Executive Branch of Government. This Court should therefore, grant Writ of Certiorari in order to speak on this question and to provide guidance to Courts for future conduct.

———o———

CONCLUSION

For reasons aforesaid, Petitioner prays that a Writ of Certiorari be granted to review the Opinion and Order of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

HAROLD D. HORAK, Petitioner

By DAVID L. HERZOG

1431 First National Center
Omaha, Nebraska 68102

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE GRAND JURY PROCEEDINGS,
HAROLD D. HORAK

APPLICATION FOR IMMUNITY

Guy L. Goodwin, Special United States Attorney for the District of Nebraska, hereby makes application for an Order instructing Harold D. Horak to testify and produce evidence, pursuant to the provisions of Title 18, United States Code, Section 6002, *et seq.*, and respectfully alleges as follows:

Harold D. Horak was subpoenaed to appear before a duly constituted grand jury for the District of Nebraska sitting at Omaha, Nebraska, which grand jury is inquiring into matters involving violations of Federal statutes.

2. On October 3, 1979, Harold D. Horak did appear before the aforesaid grand jury and refused to answer questions before the grand jury on the grounds that his answers might tend to incriminate him.

3. In my judgment as Special United States Attorney for the District of Nebraska, the testimony of Harold D. Horak concerning the matters under inquiry by the grand jury and his responses to the questions are necessary to the public interest of the United States.

4. The application is made with the approval of the Honorable John C. Kenney, Acting Assistant Attorney

General of the United States Department of Justice for the Criminal Division, pursuant to Title 18, United States Code, Section 6003 and Title 28, Code of Federal Regulations, Section 0.175.

Wherefore, I, Guy L. Goodwin, Special United States Attorney for the District of Nebraska, request the Court to grant immunity to the said Harold D. Horak pursuant to the provisions of Title 18, United States Code, Section 6002, *et seq.,* and order the said Harold D. Horak to answer questions and produce evidence relating to the matters under inquiry.

.....

Guy L. Goodwin
Special United States Attorney

VERIFICATION

I, Guy L. Goodwin, being first duly sworn, depose and say that I am the Special United States Attorney for the District of Nebraska and that the foregoing Application is made on the basis of information officially furnished and upon the basis of such information is true as I verily believe.

.....

Guy L. Goodwin

Subscribed and sworn to before me
this —— day of October, 1979.

.....

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE GRAND JURY PROCEEDINGS

HAROLD D. HORAK

ORDER GRANTING IMMUNITY

Now on this 3 day of October, 1979, this matter comes on upon the Application of Guy L. Goodwin, Special United States Attorney for the District of Nebraska, to grant immunity pursuant to Title 18, United States Code, Section 6002, *et seq.*, to Harold D. Horak and to order Harold D. Horak to testify and produce evidence before a grand jury convened in the District of Nebraska, sitting at Omaha, Nebraska.

After being advised in the premises the Court finds that a duly constituted grand jury for the District of Nebraska is sitting at Omaha, Nebraska; that the grand jury is inquiring into matters involving violations of Federal statutes; that in the judgment of the Special United States Attorney for the District of Nebraska, the testimony of Harold D. Horak concerning the matters under inquiry and his responses to the questions are necessary to the public interest of the United States; that the said Harold D. Horak has refused to testify or provide other information on the basis of his privilege against self-incrimination; and that the Acting Assistant Attorney General of the United States Department of Justice for the Criminal Division has approved the Application for Immunity.

The Court further finds that the Application for the grant of immunity in accordance with Title 18, United

States Code, Section 6002, *et seq.*, should be allowed and that the said Harold D. Horak should answer questions asked him by the grand jury.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Application heretofore made by Guy L. Goodwin, Special United States Attorney for the District of Nebraska, to grant immunity to Harold D. Horak in accordance with Title 18, United States Code, Section 6002, *et seq.*, be and the same is hereby allowed. It is further ORDERED that Harold D. Horak answer all questions asked by the grand jury.

IT IS FURTHER ORDERED that no testimony or other information compelled under the Order or any information directly or indirectly derived from such testimony or other information, shall be used against Harold D. Horak in any criminal case, except that the said Harold D. Horak shall not be exempted by this Order from prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

IT IS SO ORDERED.

Dated this ——— day of October, 1979.

.....

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE GRAND JURY PROCEEDINGS,

HAROLD D. HORAK

APPLICATION FOR IMMUNITY

Guy L. Goodwin, Special United States Attorney for the District of Nebraska, hereby makes application for an order instructing Harold D. Horak to testify and produce evidence, pursuant to the provisions of Title 18, United States Code, Section 6002, *et seq.* and respectfully alleges and states as follows:

1. That the applicant is the duly appointed Special Attorney for the District of Nebraska, appointed pursuant to 28 C. F. R. § 0.13 as a result of the refusal by the United States Attorney of himself and the Assistant United States Attorney for the District of Nebraska from participation in this matter; that a letter of appointment of applicant is on file with the Clerk of the United States District Court for the District of Nebraska.

2. Harold D. Horak has been subpoenaed to appear before a duly constituted grand jury for the District of Nebraska sitting at Omaha, Nebraska, which grand jury is inquiring into matters involving violations of Federal statutes; that the said Harold D. Horak is likely to refuse to testify and provide information to the grand jury on the basis of his privilege against self-incrimination.

3. In my judgment as Special United States Attorney for the District of Nebraska, the testimony of Harold D. Horak concerning the matters under inquiry by the

grand jury and his responses to the questions are necessary to the public interest of the United States.

4. This application is made with the approval of the Honorable Philip B. Heymann, Assistant Attorney General of the United States Department of Justice for the Criminal Division, pursuant to Title 18, United States Code, Section 6003 and Title 28, Code of Federal Regulations, Section 0.175.

WHEREFORE, I, Guy L. Goodwin, Special United States Attorney for the District of Nebraska, request the Court to grant immunity to the said Harold D. Horak pursuant to the provisions of Title 18, United States Code, Section 6002, *et seq.*, and order the said Harold D. Horak to answer questions and produce evidence relating to the matters under inquiry.

.....

GUY L. GOODWIN
Special United States Attorney

VERIFICATION

I, Guy L. Goodwin, being first duly sworn, depose and say that I am the Special United States Attorney for the District of Nebraska and that the foregoing Application is made on the basis of information officially furnished and upon the basis of such information is true as I verily believe.

.....

Guy L. Goodwin

Subscribed and sworn to before me
this 12 day of Feb., 1980.

.....

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE GRAND JURY PROCEEDINGS,

HAROLD D. HORAK

APPLICATION

GUY L. GOODWIN, Special Attorney, United States Department of Justice, being duly sworn, hereby makes application for an order directing Harold D. Horak to appear before this Court and show cause why he should not be held in contempt of this Court pursuant to Title 28, United States Code, Section 1826, and in support of this application deposes and states:

1. Applicant is a duly appointed Special Attorney of the United States Department of Justice authorized to assist in the presentation of evidence to the grand jury and trial of case or cases in the District of Nebraska.

2. In the course of this investigation before the Federal grand jury at Omaha, Nebraska, information came to the attention of the grand jury indicating the necessity and desirability of having Harold D. Horak appear and testify, and the said Harold D. Horak was subpoenaed to appear before the grand jury.

3. On February 12, 1980, this Court, upon application of the Special United States Attorney for the District of Nebraska, granted immunity from prosecution under Title 18, United States Code, Section 6002, *et seq.*, to Harold D. Horak and ordered him to answer questions propounded before the said grand jury.

4. On February 12, 1980, Harold D. Horak appeared before the said grand jury and refused to answer questions propounded by said grand jury at that time.

WHEREFORE, your applicant prays that this Honorable Court enter an order, requiring the said Harold D. Horak, the respondent herein, to appear in this Court in person and show cause why he should not be held and adjudged in contempt of this Court in view of his said contemptuous and obstructive conduct and that he be, pursuant to Title 28, United States Code, Section 1826, committed to the custody of the United States Marshal for the District of Nebraska, at Omaha, Nebraska, for the life of the grand jury sitting at Omaha, Nebraska, or until such time as he purges himself of this contempt by testifying before the grand jury.

.....

Guy L. Goodwin
Special Attorney
United States Department of Justice

SUBSCRIBED AND SWORN TO before me
this ..... day of ....., 1980.

.....

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE GRAND JURY PROCEEDINGS,

HAROLD D. HORAK

ORDER

Now on this 13th day of February, 1980, this matter comes on for the attention of the Court upon the Application of the United States of America, by and through GUY L. GOODWIN, Special Attorney, United States Department of Justice, for an Order finding HAROLD D. HORAK in direct contempt of court for his refusal to answer questions before the Federal grand jury at Omaha, Nebraska, February 12, 1980. HAROLD D. HORAK is present in person and with his attorney.

After hearing evidence and being advised in the premises, the Court finds that HAROLD D. HORAK was subpoenaed to appear before the Federal grand jury at Omaha, Nebraska, on February 12, 1980; that on February 12, 1980, this Court, upon Application of the Special United States Attorney for the District of Nebraska, granted immunity from prosecution under Title 18, United States Code, Section 6002, et seq., to said HAROLD D. HORAK and ordered him to answer questions before the said grand jury; that on February 12, 1980, HAROLD D. HORAK appeared before the Federal grand jury at Omaha, Nebraska, and refused to answer questions propounded; that HAROLD D. HORAK is in direct contempt of the Order of this Court and should be committed to the custody of the United States Marshal, pursuant to Title 28, United States Code, Section 1826.

IT IS ORDERED, ADJUDGED AND DECREED that HAROLD D. HORAK is in direct contempt of this Court for his failure to answer questions before the grand jury and he is hereby committed to the custody of the United States Marshal for the District of Nebraska, Omaha, Nebraska, until such time as he purges himself of this contempt by answering questions propounded by the grand jury or until the expiration of the life of the grand jury.

.....
United States District Judge
District of Nebraska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE GRAND JURY PROCEEDINGS,

HAROLD D. HORAK

AMENDED ORDER

(Filed February 14, 1980)

Now on this 13th day of February, 1980, this matter comes on for the attention of the Court upon the Application of the United States of America, by and through GUY L. GOODWIN, Special Attorney, United States Department of Justice, for an Order finding HAROLD D. HORAK in direct contempt of court for his refusal to answer questions before the Federal grand jury at Omaha, Nebraska, on February 12, 1980. HAROLD D. HORAK is present in person and with his attorney.

After hearing evidence and being advised in the premises, the Court finds that HAROLD D. HORAK

was subpoenaed to appear before the Federal grand jury at Omaha, Nebraska, on February 12, 1980; that on February 12, 1980, this Court, upon Application of the Special United States Attorney for the District of Nebraska, granted immunity from prosecution under Title 18, United States Code, Section 6002, et seq., to said HAROLD D. HORAK and ordered him to answer questions before the said grand jury; that on February 12, 1980, HAROLD D. HORAK appeared before the Federal grand jury at Omaha, Nebraska, and refused to answer questions propounded; that HAROLD D. HORAK is in direct contempt of the Order of this Court and should be committed to the custody of the Attorney General of the United States or his duly authorized representative, pursuant to Title 28, United States Code, Section 1826.

IT IS ORDERED, ADJUDGED AND DECREED that HAROLD D. HORAK is in direct contempt of this Court for his failure to answer questions before the grand jury and he is hereby committed to the custody of the Attorney General of the United States or his duly authorized representative, until such time as he purges himself of this contempt by answering questions propounded by the grand jury or until the expiration of the life of the grand jury.

Robert V. Denney
United States District Judge
District of Nebraska

APPENDIX C(1)

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 80-1124

IN RE GRAND JURY PROCEEDINGS,

HAROLD D. HORAK

Appeal from the United States District Court
for the District of Nebraska

Submitted: March 11, 1980
Filed: May 12, 1980

Before BRIGHT, ROSS and McMILLAN, Circuit Judges.

ROSS, Circuit Judge.

Harold D. Horak appeals from an order of the Honorable Robert V. Denney, United States District Judge for the District of Nebraska, entered February 13, 1980, holding Horak in civil contempt pursuant to 28 U. S. C. § 1826, for his refusal to testify before a federal grand

jury after having been granted immunity in accordance with 18 U. S. C. §§ 6002 and 6003.

The district court ordered that Horak be confined in the custody of the Attorney General until he testified before the grand jury or until the expiration of the term of the grand jury, the confinement to interrupt a sentence Horak was then serving on convictions for wiretapping and perjury in violation of 18 U. S. C. §§ 2511 and 1623. *See Martin v. United States,* 517 F. 2d 906, 909 (8th Cir.), *cert. denied,* 423 U. S. 856 (1975).

Horak, then Security Director of Pamida, Inc., an Omaha, Nebraska discount chain, was convicted of wiretapping and perjury in April 1979. He did not appeal this conviction and in October 1979, Horak was brought before the Nebraska grand jury pursuant to a writ of habeas corpus *ad testificandum.* The grand jury was continuing its investigation into the involvement of other high officials of Pamida, Inc., in wiretapping at Pamida, Inc., duirng 1976-1978. The grand jury was also investigating a possible violation of the obstruction of justice statute, 18 U. S. C. § 1503, based on alleged evidence that Horak had accepted money and offers of future financial reward from other Pamida officers for keeping their part in the wiretapping activities silent.

At the October grand jury, Horak refused to testify on Fifth Amendment grounds. He was granted immunity pursuant to 18 U. S. C. §§ 6002 and 6003, on the authorization of the *Acting* Assistant Attorney General. Horak persisted in his refusal to testify but no civil or criminal contempt citation was sought at that time.

Thereafter, although unnecessary,[1] the government obtained a new authorization for immunity from the Assistant Attorney General of the Criminal Division, United States Department of Justice. On February 4, 1980, government counsel advised Horak's attorney by letter that the new immunity authorization had been obtained from the Assistant Attorney General and that Horak would be recalled before the grand jury on February 12, 1980. Government counsel's letter also advised Horak's attorney that if Horak persisted in his refusal to testify, civil contempt proceedings would be initiated.

On February 12, 1980, Horak was again given immunity pursuant to 18 U. S. C. §§ 6002 and 6003, on the basis of the new authorization from the Assistant Attorney General. The 1978 grand jury had expired and on February 12, 1980, Horak was brought before the February 1980 grand jury, which had resumed the investigation of the wiretapping and obstruction of justice commenced by the prior grand jury. The February 1980 grand jury heard other witnesses regarding these offenses and then called the immunized Horak to testify. Horak was asked several questions relating to the participation of officials of Pamida, Inc., in the wiretapping and about

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1 Horak had contended that the first grant of immunity was improper because the *acting,* rather than *actual,* Assistant Attorney General authorized the order. He repeats this contention in his argument suggesting bad faith on the part of the government. This contention is without merit. Under 18 U. S. C. § 6002 "any designated Assistant Attorney General," including one, as here, designated to act on behalf of the Assistant Attorney General, may request an order granting a witness immunity at a proceeding before the grand jury.

the money and offers of financial reward made to him. To all of these questions Horak refused to testify, stating:

> I respectfully refuse to testify and to claim my right to be free from self-incrimination, double jeopardy and an improperly authorized immunity order. I fear the penalties that Judge Denney could put on me under 18 USC § 401.

The government then filed its application for an order to show cause why Horak should not be held in civil contempt pursuant to 28 U. S. C. § 1826, and on February 13, 1980, Horak and his attorney appeared before the Honorable Robert V. Denney, where Horak repeated his intention to continue to refuse to testify before the grand jury. The district court found Horak in civil contempt and ordered him confined until he testified or until the grand jury expired.

Horak brings this appeal from that order, pursuant to 28 U. S. C. § 1826 (b), contending: (1) that he had "just cause" under 28 U. S. C. § 1826 (a) for his refusal to testify before the grand jury because he believed that the grant of immunity was insufficient to preserve his fifth amendment privilege against self-incrimination, leaving him exposed to potential punishment by the district court under 18 U. S. C. § 401 for criminal contempt; and (2) that he has been subjected to double jeopardy and that the government acted in bad faith by subpoenaing him to appear before both the 1978 and 1980 grand juries, yet initiating contempt proceedings only after he refused to testify before the second grand jury. We affirm the order of the district court.

Horak's principal claim is that his refusal to testify was justified because the immunity granted him under

18 U. S. C. § 6002 was inadequate, on the facts of this case, to protect his rights under the fifth amendment. In particular, he argues that the district court could prosecute him for criminal contempt for previous false trial testimony if his testimony now differs from that given at trial. We disagree.

Truthful testimony before the grand jury would not pose a threat of prosecution for perjury or for criminal contempt.[2] Moreover, the district court clearly assured Horak that:

> if there is any attempt to prosecute this man again, you will have real trouble with this Court. * * * Mr. Horak, I am going to order that you answer the questions and even though these might be different than what you said in the hearing that we had some months ago, you are to answer them truthfully, *and you are protected for any answer you gave to this Grand Jury as far as perjury charge is concerned with reference to previous testimony in the trial because this is "use" immunity, and they cannot use this testimony to convict you for perjury for what you testified to in the previous trial.* Do you understand that? So I am going to tell you to answer these questions and answer them just as truthfully as you can.

Judge Denney repeated these assurances to Horak at a hearing on February 12, 1980, stating:

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2 This protection would not be afforded if Horak testifies falsely before the grand jury and is prosecuted for perjury in connection with the testimony he gives to the grand jury under the grant of immunity. Furthermore, truthful testimony may be used in conjunction with false testimony given during the course of immunizied testimony at a subsequent trial for perjury where its use is not prohibited by the fifth amendment. *United States v. Apfelbaum,* 48 U. S. L. W. 4217, 4219 (No. 78-972, filed March 3, 1980).

> Whether it is diametrically opposed to what he testified before the Grand Jury before or before the trial before me, I don't think it can be used to prove anything and *I will be the first one to stop it* and I think she should testify, that's my thought.

(Emphasis added.) Indeed, *this* court would take a dim view of any attempt to use Horak's immunized truthful testimony as a basis for a perjury or criminal contempt prosecution relating to his prior testimony.

In light of Judge Denney's assurances and the government's assertions at oral argument that neither would seek to prosecute Horak for perjury in his prior testimony, on the basis of his requested grand jury testimony, as well as the protections afforded Horak under the fifth amendment and the grant of immunity, we conclude that, under these circumstances, Horak lacks "just cause" for his refusal to testify before the federal grand jury.

We also reject Horak's claim that he has been subjected to double jeopardy. Horak was held in civil contempt for his refusal to testify before the February 1980 grand jury but *not* held in contempt for his refusal to testify before the grand jury in October 1979. He therefore has not been twice subjected to jeopardy.

Moreover, in the instant case, the district court ordered that Horak be confined in the custody of the Attorney General only until he testified before the grand jury or until the expiration of the term of the grand jury. Under these circumstances, there can be no question that Horak's confinement for contempt is civil in nature and, as such, may not be made the subject of a double jeopardy claim. *Shillitani v. United States,* 384 U. S. 364, 371 n. 8 (1966).

Finally, Horak's contention that the government acted in bad faith by not prosecuting him for contempt in connection with his refusal to testify before the grand jury in October 1979 is without merit.

Although "repeated questioning on the same subject of the inquiry within which a recalcitrant witness has already refused answers," *Yates v. United States,* 355 U.S. 66, 73 (1957), may in some instances suggest bad faith on the part of the government, we do not believe that this case involves prosecutorial misonduct amounting to a denial of due process. Here, the grand jury seeks further information from Horak based on newly discovered evidence regarding other officials' inovlvement in wiretapping at Pamida as well as other possible crimes. Thus, the scope of inquiry by the grand jury is not the same as when Horak initially testified.

We are satisfied that the purpose of requesting Horak to appear before the 1978 grand jury and its successor grand jury in 1980 was not for the purpose of harrassing Horak or of coercing him to testify untruthfully, *see, e.g., Brown v. United States,* 245 F.2d 549, 554-55 (8th Cir. 1957), with a view to prosecuting him for perjury. *See also United States v. Mandujano,* 425 U.S. 564, 583, 585, 609 (1976).

Accordingly, we affirm the order of the district court holding Horak in civil contempt, and we therefore order that Horak be returned to the custody of the Attorney General, in accordance with the order of the district court of February 13, 1980, until Horak testifies before the

grand jury or until the expiration of the term of the grand jury.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C(2)

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

September Term, 1979

80-1124

IN RE: GRAND JURY PROCEEDINGS

HAROLD D. HORAK

Appeal from the United States District Court
for the District of Nebraska

The Court, having considered petition of Harold D. Horak for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

May 29, 1980

APPENDIX C(3)

The mandate of this Court in the above case is being issued today and sent to the Clerk of the United States District Court of the District of Nebraska at Omaha, Nebraska.

By the Clerk of the United States
Court of Appeals for the Eighth Circuit,
ROBERT D. ST. VRAIN